

FINAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections of the California Code of Regulations (CCR), Title 15, Division 3, concerning Citizens Complaints.

These regulations will bring CDCR into immediate compliance with the Ninth Circuit Court of Appeals opinion in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, which held that Penal Code (PC) 148.6, which criminalizes knowingly false speech critical of peace officer conduct, violates the First Amendment.

Therefore, the Department must modify Sections 3084.1 and 3391. This action will clarify and amend CCR Sections that are now deemed in violation of the constitution.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has made a determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

Subsection 3084.1(e) is adopted to delete the specific references to PC148.6(a)(1) which has been deemed to be unconstitutional by the Ninth Circuit Court of Appeals. Existing language in 3084.1 states that it is against the law to knowingly make a false complaint against a peace officer. According to *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, this is unconstitutional in that it violates the First Amendment.

Subsection 3391(d) is adopted to delete language, which was copied in its entirety from PC 148.6(a)(1) and (2) and placed into this Subsection. This specific language has been deemed to be unconstitutional by the Ninth Circuit Court of Appeals. Existing language in Section 3391 states that it is against the law to knowingly make a false complaint against a peace officer. According to *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, this is unconstitutional in that it violates the First Amendment. The remainder of the existing language found in 3391(d) is left unchanged due to the requirement that a State agency must have a procedure to investigate these types of complaints.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

PUBLIC HEARING COMMENTS:

Public Hearing: Held January 9, 2007, at 10:00 a.m.

No one commented at the Public Hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

Commenter #1:

Comment: Commenter states that when submitting a Citizens Complaint to the Institution Appeals Coordinator it is sometimes intercepted and thrown away. According to the commenter by the time the inmate knows that his/her appeal has not reached the Appeals Coordinator he/she is barred from submitting the appeal due to not meeting the time frames. Commenter further requests that a type of procedural safe guards be established to ensure that the citizen's complaints are not intercepted and thrown away.

Accommodation: None.

Response: The Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment is generalized and personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Commenter #2:

Comment A: Commenter contends that the Chaker decision should be applied to CCR Section 3021 as it was to CCR Sections as 3084.1(e) and 3391(d). Commenter states that this CCR section is in need of amending because it also violates the First Amendment.

Accommodation: None.

Response A: The Department disagrees and contends that a legal analysis was done to determine whether this proposed regulation was in conflict with other related sections of the CCR. Any section that was impacted by this regulation change was amended for consistency and included in this rule-making action. The Department contends that

CCR Section 3021 does not require amending in order to carry out the specific provisions of the decision in Chaker.

Comment B: Commenter contends that he had filed a citizen's complaint where he alleged that the staff of the prison where he was housed failed to use reasonable precaution to leave his property in good order upon the completion of a cell search. Commenter contends that a Director's Level Review response was issued and it maintained that "appellant presents no information that reprisals were taken against him." According to commenter this statement is in conflict with the courts.

Accommodation: None.

Response B: The Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment is generalized and personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment. Also the Department contends that the specific case factors regarding the citizen's complaint filed by the commenter can not be addressed through rule making.

Comment C: Commenter contends that he was threatened with disciplinary action by a staff member having responsibility for answering his appeal. According to the commenter he was threatened because he placed the following sentence on his appeal "submitted for the sole purpose of exhaustion for the purpose of the Prison Reform Act".

Accommodation: None.

Response C: The Department contends that although the above comment does regard an aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment is generalized and personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment. Also the Department contends that the specific case factors regarding the citizen's complaint filed by the commenter can not be addressed through rule making.

Comment D: Commenter contends that the department should not be allowed to impose disciplinary infractions under CCR Section 3021, Falsification of Records or Documents when processing Citizens Complaints. Commenter further states that continued reliance on CCR Section 3021 as a disciplinary tool will dissuade inmates from filing Citizens Complaints.

Accommodation: None.

Response D: The Department disagrees and contends that the Department's use of CCR Section 3021 is not the subject of this rulemaking proceeding. That said, CCR Section 3021 prohibits inmates and parolees from intentionally entering or introducing false information into or upon any record or document maintained by CDCR, and as such, does not offend the First Amendment under the Ninth Circuit Court of Appeal's analysis in Chaker v. Crogan.

Commenter #3

Comment: Commenter states that while she believes that making a false claim against a person is not necessarily *illegal*, she states she is quite certain that this type of behavior is a civil offense. Commenter contends that this type of offense is “slander and libel”. Commenter further states that it has never been her understanding that the Fifth Amendment protects against slander and libel. According to the commenter there should be an available civil recourse which would make provision for holding inmates accountable for making false statements against peace officers or other staff.

Accommodation: None.

Response: The department contends that nothing in this regulation is intended to affect the civil process that may be available concerning this type of behavior. Peace officers, like everyone else, may bring libel and slander cases on their own in the civil courts of this state.

Commenter #4

Comment A: Commenter asks whether the change in regulation which was motivated by the Chaker decision, will eliminate the practice of “screening out” appeals by unscrupulous staff that are submitted as ‘citizens complaints’. Commenter states that at the institution he is assigned to, appeals are being screened out for a number of reasons in order to obstruct the complaint process.

Accommodation: None.

Response A: The department contends that there are policies in place that address the screening process of a CDC Form 602, Inmate/Parolee Appeal. These processes include designated staff screening the appeals based on the type of appeal and the requirements set forth in CCR Section 3084. Additionally if the commenter perceives that he is being treated unfairly and has specific information regarding the inappropriate conduct of a staff member, he is encouraged to file a complaint directly with the CDCR Office of Internal Affairs. Finally, the specific case factors of the commenter can not be addressed in this forum.

Comment B: Commenter asks what proof the proposed regulation has that the citizen’s complaints will be maintained for a period of five years and not “hidden” by the appeals coordinator at the institutions.

Accommodation: None.

Response B: The department contends that the requirement to maintain these documents for a period of five years was not part of this rule making action. Additionally **See this Commenter, Response A.**

Comment C: Commenter states that it is a conflict of interest when a citizen’s complaint is submitted alleging misconduct of the staff member holding the position of the Institution Inmate Appeals Coordinator. Commenter further states that the staff member may screen out the appeal. Commenter asks where are the procedural safeguards regarding this instance.

Accommodation: None.

Response C: The department reminds the commenter that if the commenter perceives that he is being treated unfairly and has specific information regarding the inappropriate conduct of a staff member, he is encouraged to file a complaint directly with the CDCR Office of Internal Affairs. Also the specific case factors of the commenter can not be addressed in this forum.

Commenter #5

Comment: Commenter appears to be an inmate in a prison and asks a series of process questions regarding the CDC Form 602, Inmate/Parolee Appeal. Commenter further requests to be sent a Departmental Operations Manual section regarding this issue.

Accommodation: None.

Response: These types of requests can not be addressed in this forum. The department encourages the commenter to contact a Correctional Counselor, the Appeals Staff assigned to his specific institution, or utilize the institution Law Library for the requested information.

Commenter #6 and #7

Comment A: Commenters who both represent themselves as CDCR employees, contend that they believe it is the public's right to generate a lawful complaint against Peace Officer personnel. Commenters add that this is a good check and balance tool to correct unprofessional behavior. Commenters further contend that in their professional opinion and their opinion as a private citizen that the majority of complaints against Peace Officer personnel in the institutions are fabricated by the convicted felon as a means to file a civil lawsuit for monetary gain.

Accommodation: None.

Response A: The department contends that the motivating factors behind an inmate's filing of a Citizen's Complaint is not part of this rule making action. The department did not initiate this change. The rule change was necessary to bring the Department into immediate compliance with the Ninth Circuit Court of Appeals opinion in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, which held that Penal Code 148.6, which criminalizes knowingly false speech critical of peace officer conduct, violates the First Amendment. The department was not party to the court case. However the courts's decision does effect Peace Officers in California, including Correctional Officers.

Comment B: Commenters state that inmates and parolees under the department's jurisdiction are generational family members who have passed on the tactic of knowingly filing a false complaint against peace officers. Commenters continue to state that as a result of the complaint, peace officers are removed from their posted positions in order to facilitate an inquiry and, pending the outcome of this inquiry, the department is required to hire staff in an overtime capacity and conduct an investigation. According to the commenters this is a large expense and is a burden to the tax payers of the State of California. Commenters contend that this type of behavior can not be tolerated by the taxpayers.

Accommodation: None.

Response B: See this Commenter, Response A.

Comment C: Commenters contend that if the Law Enforcement agencies and their staff are to be held to such a standard, there needs to be repercussions for knowingly making a false accusation against a peace officer. According to the commenters, these types of issues cost the taxpayer hard earned money and there needs to be a way to control this behavior.

Accommodation: None.

Response C: See this Commenter, Response A.

Commenter #8

Comment: Commenter contends that he agrees with the rule making change. Commenter states that while at San Quentin Prison he experienced the type of behavior described in section 3391, which caused him fear and pain. Commenter further states that CDC abuses their power and hides their mistakes in the CDC appeals process. Commenter states that this rule change should “remain in effect”.

Accommodation: None.

Response: The department neither agrees nor disagrees with the commenter in that we as a Department did not initiate this change. The rule change was necessary to bring the Department into immediate compliance Ninth Circuit Court of Appeals opinion in Chaker v. Crogan (9th Cir. 2005) 428 F.3d 1215, which held that Penal Code 148.6, which criminalizes knowingly false speech critical of peace officer conduct, violates the First Amendment.